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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1

CHRYSLER CORPORATION, Petitioner,

v.

CLEMENT GABRIELE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

CLEMENT GABRIELE, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Chrysler Corporation respectfully petitions this Court to issue a writ of certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinion of the court of appeals (App. A, *infra*, pp. 1a-15a) is not yet officially reported. The opinion of the district court (App. B, *infra*, pp. 16a-31a) is reported at 416 FSupp 666 (E.D. Mich. 1976).

Jurisdiction

The judgment of the court of appeals was entered on April 7, 1978. The jurisdiction of this Court is invoked under 28 USC §1254(1).

Questions Presented

1. **Whether 633(b) of the Age Discrimination in Employment Act (ADEA) 29 USC §621 *et seq.* requires a claimant to first pursue his state remedies before bringing an action under the aforesaid act in a United States District Court.**
2. **Whether the claimant under the ADEA must pursue his state remedies in a timely fashion if the answer to the immediately foregoing question is answered in the affirmative.**

Statutes

The relevant provisions of the Age Discrimination in Employment Act, 29 USC §621 *et seq.* (to with: 633(b) and §626(d)) and Title VII of the Civil Rights Act of 1964, 42 USC §2000-e-5(c) are set forth as App. C, *infra*, pp. 32a-34a).

Statement of the Case

In 1975 respondent was a methods and standards engineer at petitioner's Warren Truck Plant in Warren, Michigan. He was assigned to the Heavy Duty Truck Department. In May of 1975 the heavy duty truck operation was discontinued, and respondent was put on an indefinite layoff effective May 9, 1975.

On August 15, 1975 respondent attempted to file a complaint with the Michigan Civil Rights Commission (MCRC). On September 3, 1975 respondent was informed in writing that MCRC could not accept his complaint because it was not filed within 90 days of the alleged discriminatory act, as required by Michigan law. The respondent filed the instant action on November 6, 1975 in the United States District Court, Eastern District of Michigan, Southern

Division, claiming a violation of the ADEA. That respondent gave the requisite 60-day notice to the Secretary of Labor as required by §626(d) of the ADEA is not disputed.

Petitioner filed a motion for summary judgment requesting that the matter be dismissed upon the grounds that respondent had not complied with §633(b) of the ADEA by first seeking relief from the appropriate state agency in a timely fashion sixty days prior to the initiation of an action under the ADEA. Petitioner's motion was heard before the Honorable Cornelia G. Kennedy, who issued an Opinion and Order Granting petitioner's motion for summary judgment and a judgment in accordance therewith. Judge Kennedy held that compliance with §633(b) of the ADEA was a mandatory jurisdictional prerequisite and failure to so comply deprived the Court of authority to entertain an action brought under the ADEA. The Court then held that respondent's failure to commence proceedings with the MCRC before the expiration of its limitation period was not in compliance with §633(b) of the ADEA. On August 3, 1976, respondent filed Notice of Appeal of Judge Kennedy's decision.

On April 7, 1978, the Court of Appeals issued its opinion and order reversing the judgment of the District Court. The majority of the Court of Appeals (the Honorable Judge Edwards and Judge Celebrezze) made no specific determination as to the issue of whether a claimant under the ADEA had to pursue his state remedies in a timely fashion as a condition precedent to bringing a suit under said statute but rather made the following broad ruling:

> "We determine that 29 USC 633(b) does not require prior resort to an available state agency as a prerequisite to an ADEA suit in federal court."

Obviously, the above-quoted ruling obviated the necessity of ruling upon the narrower issue presented on appeal from the lower court.

The concurring opinion of the Honorable Judge Lively disagreed with the majority's broad ruling and concluded that §633(b) of the ADEA did indeed require a claimant to initiate state proceedings prior to filing a suit under said act; but a failure of a claimant to file with the state agency within the period of time prescribed by state law did not bar a claimant from bringing an action in federal court under the ADEA if the claimant fulfilled the other requirements of the act.

Reasons for Granting the Petition

Petitioner Chrysler Corporation submits that there are two compelling reasons for this Court to grant the instant Petition for Certiorari. Initially, the decision of the Court below is erroneous as a matter of law. Secondly, there is split between the United States Circuit Courts of Appeal on both issues presented to this Court; and thus, for the sake of both uniformity of the law and certainty as to what conditions precedent must be met by a claimant under the ADEA before he can institute an action in a federal district court, a decision by this Court on the aforestated issues is necessary.

1. The decision of the Sixth Circuit Court of Appeals is erroneous as a matter of law.

The most obvious problem with the determination of the Court immediately below is that it contravenes the clear wording of the statute. Section 633(b) of the ADEA reads as follows:

> "Limitation of Federal action upon commencement of State proceedings
>
> "(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, *no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law,* unless such proceedings have been earlier terminated: . . . If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority." (emphasis added)

The State of Michigan has a statute prohibiting discrimination based on age, MSA §17.458(3a). It also has an agency with the authority to enforce the statute, MSA §17.458(7).

The Michigan statute contains the following provision concerning the limitation period for filing complaints:

> "Any individual claiming to be aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, within 90 days after the alleged act of discrimination a cerified complaint in writing. . . ." MSA §17.458(7)(b)

Compliance with this 90-day limitation period has been held to be a mandatory jurisdictional prerequisite for action

by MCRC. *Chrysler Corporation* v. *Michigan Civil Rights Commission*, 68 MichApp 283, 242 NW2d 556 (1976).

To date, of the Circuit Courts, only the Sixth Circuit has ruled that the language of §633(b) does not mean what it says, and that failure to initiate state remedies does not bar an action in Federal court. While there have been a few district court opinions supportive of the Sixth Circuit positions, they are in the distinct minority. *Smith* v. *Jos. Schlitz Brewing Co.*, 419 FSupp 770 (D. N.J. 1976); *Vazquez* v. *Eastern Airlines Inc.*, 405 FSupp 1353 (D. P.R. 1975); *Bertrand* v. *Orkin Exterminating Co.*, 419 FSupp 1123 (N.D. Ill. 1976); *Skoglund* v. *Singer Co.*, 403 FSupp 797 (D. N.H. 1975).

The other Circuit Courts which have addressed the issue of whether one must initiate state proceedings pursuant to §633(b) in order to bring an action in Federal court have determined that compliance with §633(b) is a mandatory prerequisite. *Evans* v. *Oscar Mayer, et al.*, F2d C.A. No. 77-1692 (8th Cir. 1978); *Reich* v. *Dow Badische Co.*, F2d , 17 FEP 363 (2d Cir. 1978); *Bonham* v. *Dresser Industries*, 569 F2d 187 (3d Cir. 1977); *Curry* v. *Continental Airlines*, 513 F2d 691 (9th Cir. 1975); *Goger* v. *H. K. Porter Co.*, 429 F2d 13 (3d Cir. 1974). See also *Hadfield* v. *Mitre Corp.*, 562 F2d 84, 87-88 (1st Cir. 1977). Moreover, the vast majority of district courts have ruled likewise. *Enos* v. *Kaiser Industries Corp.*, 443 FSupp 798 (D.C. D.C. 1978). *Fitzgerald* v. *New England Telephone Co.*, 437 FSupp 635 (D. Mass. 1977); *McGinley* v. *Burroughs Corp.*, 407 FSupp 903 (E.D. Penn. 1975); *Vaughn* v. *Chrysler Corporation*, 382 FSupp 143 (E.D. Mich. S.D. 1974); *McGarvey* v. *Merck & Co., Inc.*, 359 FSupp 525 (D.C. N.J. 1973); *Rucker* v. *Great Scott Supermarkets, Inc.*, 10 EPD ¶10,508 (E.D. Mich. S.D.

1974); *Smith* v. *Crest Communities, Inc.* 9 EPD ¶10,053 (D.C. W.D. Ky. 1974); *Graham* v. *Chrysler Corporation*, Civil Action No. 6-70125, E.D. Mich., March 19, 1976 (J. DeMascio).

It would be difficult to state in plainer, less ambiguous language that an aggrieved party under the ADEA cannot file a suit pursuant thereto until he has first commenced state proceedings. Indeed, §626(d) of the ADEA has comparable language:

> "(d) *No civil action* may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> "(1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> "(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."
>
> (Emphasis added)

The Sixth Circuit has held that the above-quoted language of §626(d) which is, as noted above, quite similar to the language of §633(b) imposes a jurisdictional prerequisite to bringing an action under the ADEA. *Hiscott* v. *General Electric Co.*, 521 F2d 632 (6th Cir. 1975); *Rucker* v. *Great Scott Supermarkets*, 528 F2d 393 (6th Cir. 1976); *Eklund* v. *Lubrigo Corp.*, 529 F2d 24 (6th Cir. 1976). There is no reason to treat the equally clear language of §633(b) any differently.

Furthermore, most of the above-cited decisions finding

§633(b) to be a mandatory prerequisite to an ADEA action have noted the striking similarity between its language and a parallel provision of Title VII of the Civil Rights Act of 1964 which reads as follows:

> "(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, *no charge may be filed under the subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law,* unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State of local authority.
> 42 USC §2000e-5(c) (Emphasis added)

The above-quoted provision has been repeatedly construed to require that the appropriate state agencies be given prior opportunity to consider discrimination complaints prior to resorting to the federal courts. *Love* v. *Pullman Co.*, 404 US 522, 92 SCt 616, 30 LEd2d 679 (1972); *DuBois v. Packard Bell Corp.*, 470 F2d 973 (10th Cir. 1972); *Crosslin* v. *Mountain States Telephone and Telegraph Co.*, 422 F2d 1028 (9th Cir. 1970), vacated and remanded, 400 US 1004, 91 SCt 562, 27 LEd2d 618 (1971); *Electrical Workers Local 5* v. *EEOC*, 398 F2d 248 (3rd Cir. 1968) cert. denied, 393 US 1021, 89 SCt 628, 21 LEd2d 565 (1968); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F2d 267 (4th Cir. 1967); *Abshire* v. *Chicago and Eastern Illinois RR Co.*, 352 FSupp 601 (1972); *Oubichon* v. *North American Rockwell Corp.*, 325 FSupp 1033 (C.D. Calif. 1970); *Ethridge* v. *Rhodes*, 268 FSupp 83 (S.D. Ohio 1967).

The courts, in interpreting §633(b), took the natural and very logical position that since nearly identical language was used in the 1964 Civil Rights Act that Congress must have intended that it serve the same purpose. See *Evans* v. *Oscar Mayer, supra; Reich* v. *Dow Badische Co., supra; Goger* v. *H. K. Porter Co., supra; Curry* v. *Continental Airlines, supra; Vaughn* v. *Chrysler Corporation, supra;* and *McGarvey* v. *Merck & Co., supra.* The majority of the Court of Appeals below, however, found this similarity in language unpersuasive. The Court expressed an opinion that there was no legislative history accompanying §633(b) and, thus, no reason to apply the prevailing interpretation of §2000e-5(c) to §633(b). The Court's opinion simply ignores the doctrine of in pari materia which comes into play when the language of one statute is the same or similar to the language of a later statute and both statutes pertain to the same or similar subject matter. When this occurs, and there is some ambiguity as to the meaning of the later statutory provision, the later provision should be given the same interpretation as the former provision. *Northcross* v. *Board of Education of the Memphis City Schools, et al.*, 412 US 427, 93 SCt 2201, 37 LEd 48 (1973). (The Court in this case calls this the doctrine of "pari passu.") See also 73 AmJur 2d, Statutes, §§186-193 and §233.

Additionally, there is indeed legislative history, which was brought to the attention of the Court below, that indicates an intent by Congress to incorporate into the proposed bill S.830 the same scheme used in Title VII §2000e-5(c) of deferring to the states for sixty days before intervention by the Federal law. Mr. Andrew Biemiller, the legislative director of the AFL-CIO commented as follows during the Senate hearings:

> "Senator Fannin: Would you like to comment or give your thoughts as to what should be done as far as any preemption is concerned?
>
> "M. Biemiller: We are frankly a little disturbed by the section in the bill that is now before you which is designed to negative [sic] Federal preemption in this field. I think it could lead to great confusion, because if I read it properly, you are virtually leaving the State laws unhampered in their respective jurisdictions.
>
> "It would seem to me it would be a far more practical and preferable solution if you would take the pattern that was developed by Senator Dirksen and Senator Humphrey, working in concert, in connection with Title VII of the Civil Rights Act of 1964, creating the Equal Employment Opportunities Commission. There, as I recall, when you have a State law that is substantially in agreement with the Federal law a matter of 60 days is given to the State fair employment agency to try to solve the problem.
>
> "At the end of that time, if the matter is not resolved the case is moved to the Federal agency. I think this would be preferable to trying to say that, where there is a State law, the State agency shall have full and complete jurisdiction.
>
> "Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 & S. 788, 90th Congress, 1st Sess. 1967, at 102 [Senate hearings]."

Further commentary was made by Mr. Edward Conway of the New York Commission on Human Rights who stated:

> "It is of particular importance that careful attention be given to the Federal-State relationship which will arise from the enactment of Federal legislation in the field of human rights where existing State legislation has been administered successfully over a period of years. This factor was taken into account by the Congress upon its consideration an enactment of the Civil Rights Act of 1964.
>
> "The experience under those provisions would appear to confirm the need for avoiding any implications of preemption of the field under the Federal statute.
>
> "This requires a clear and specific saving clause which will not only save the jurisdiction of the State agencies, but will avoid to the greatest extent possible the coming into being of unnecessary duplications of effort.
>
> "Senate hearings, at 234."

The foregoing compels us inexorably to the conclusion that the purpose and intended effect of §633(b) of the ADEA is the same as §2000e-5(c) of Title VII. Both of the aforementioned provisions were designed to mitigate the further erosion of the federal system of government. Congress was acutely aware of the concerns of the various states as to the far-reaching arm of the Federal Government and its continued encroachment upon the sovereign powers of the individual states. It was recognized that it was necessary to balance the rights and needs of the citizens with the policy of doing as little violence as possible to the federal

system of government. Both §633(b) of the ADEA and §2000e-5(c) of Title VII of the 1964 Civil Rights Act achieve this by giving the states sixty days to resolve the problem under their own laws and enforcement mechanisms, after which the Federal Government can take jurisdiction over the matter. Senator Hubert Humphrey expressed the concerns of Congress in this regard when he spoke in refence to the pending legislation that would ultimately become the 1964 Civil Rights Act. He stated:

> "The major substantive changes give increased emphasis to the role of State and local authorities and to methods of securing voluntary compliance. This is both salutary and consistent with the basic philosophy of the bill—that, whenever possible, the problems dealt with by the bill should be resolved locally and voluntarily. 110 Cong. Rec. 12707 (1964).
>
> "If the practice complained of occurs in a State or locality which has a law prohibiting such practices and establishing an agency to deal with them and there is no such agreement the individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle the problem under State or local law. However, after the agency has had 60 days to adjust the complaint or after it terminates proceedings on it, the complainant may go to the Federal Commission. 110 Cong. Rec. 12721 (1964)."

See also comments of a similar vein made by Senator Dirksen, 110 Cong. Rec. 13087 (1964) and by Senator Case, 110 Con. Dec. 13081 (1964).

It is quite obvious that this policy could only effectively be achieved if it is mandatory for a claimant to pursue his state remedies first. Clearly, the only effective way of enforcing this requirement is to deny the claimant access

to the Federal system if he refuses to proceed with the state agency; and as noted above, this is precisely what most of the Courts have determined to be required by both §2000e-5(c) and §633(b).

The Sixth Circuit found that the structure of §633 required that lesser deference be given to the states than does §2000e-5(c), since §633(a) App. p. 8a, unlike §2000e-5(c), provides that any state action is superseded by commencement of an action under the ADEA and that §633(d), unlike §2000e-(5c), allows for concurrent administrative action by the stat eagency and the Department of Labor. The Sixth Circuit then concluded that since Congress accorded the states lesser deference in the ADEA than it accorded the states under Title VII of the 1964 Civil Rights Act there was no reason to require state action as a prerequisite to an ADEA lawsuit. This conclusion is simply a *non-sequitor*. The fact that Congress may have intended to give the states lesser deference under the ADEA than under Title VII hardly supports a ruling which gives the states *no* deference whatsoever.

As a final justification for its determination, the majority panel states that the ADEA is remedial legislation and, therefore, should be construed liberally. However, this "liberal construction" of the Court entailed what was tantamount to redrafting not only §633(b) but also §636 (d)(2) of the ADEA.

The Sixth Circuit took the very direct and unambiguous language of §633(b), which reads in pertinent part:

> ". . . no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under State law, . . ."

and mystically transmogrified it to mean that a claimant has the "option of pursuing state remedies" and "[i]f that option is elected, then the state agency must be given the required sixty days to reconcile the dispute before a suit can be filed in federal court." App. A p. 13a. Such an interpretation of the statute is to leave the realm of liberal construction and enter the field of editing.

Moreover, to avoid having its interpretation of 633(b) result in giving a claimant living in a deferral state a windfall benefit of an additional one hundred and twenty days within which to file an action under the ADEA, the Court had to redraft §626 as well. Section 626(d) requires that a claimant must file his notice of intention to sue with the Secretary of Labor within one hundred and eighty days after the alleged unlawful practice; but, if the claimant lives in a state in which §633(b) applies, §626(d)(2) gives him three hundred days after the alleged unlawful practice has occurred or within thirty days after receipt of notice of termination of the state proceedings, whichever is earlier. In order to avoid the unjust result of a claimant's bypassing the state agency, but receiving the benefit of the extended filing period, which Congress obviously intended to apply only to claimants who had filed with the state agency, the Court judicially revised 626(d). It interpreted §626(d)(2) to read that a claimant "obtains the benefits of the extended filing period in §626(d)(2) *only* if he is in a "deferral state" *and* elects to use the state's mechanisms to attempt a conciliation of the grievance. (Emphasis the Court's). App. A p. 11a.

It would seem that if Congress had intended such an imaginative result it clearly could have provided for this contingency in the statute. The fact that it did not do so is indicative that this was not Congress's intent. Certainly

such an unwarranted exercise of judicial legislation would not be necessary if the plain language of §633(b) was followed so that failure to comply with that provision bars a claimant from pursuing an action under the ADEA.

With regard to the narrower and second question presented of whether a claimant must pursue his state remedies within the state limitations period, it would appear that a ruling that the commencement of state proceedings is a prerequisite to filing a valid action in federal court under the ADEA would require a commensurate holding that filing in a timely fashion with the state is likewise required.

To allow a claimant to bring an action in Federal court after the state limitation period has lapsed would also be in contravention of the above-described federal policy, and a number of courts have so held. *Reich* v. *Dow Badische Co., supra; Enos* v. *Kaiser Industries Corp., supra; Graham* v. *Chrysler Corporation, supra; Smith* v. *Crest Communities, Inc., supra; Vaughn* v. *Chrysler Corporation, supra, McGarvey* v. *Merck & Co., supra;* see also *Fitzgerald* v. *New England Telephone and Telegraph Co., supra. Contra, Bonham* v. *Dresser Industries, Inc., supra; Nickle* v. *Shatterproof Glass Corp.,* 424 FSupp 884 (E.D. Mich. 1976); *Magalotte* v. *Ford Motor Co.,* 418 FSupp 430 (E.D. Mich. 1976); *Bertsch* v. *Ford Motor Co.,* 415 FSupp 619 (E.D. Mich. 1976). The court in *McGarvey* v. *Merck & Co.* explained its retionale as follows:

> "[T]o construe the statute as plaintiff suggests would create a 'loophole' in Section 633(b) which flies in the face of congressional intent . . . [A]ny plaintiff could easily by-pass state agencies by waiting, for whatever reasons, until after the state Statute of Limitations had expired before commencing

> suit in a federal forum. Congress clearly did not intend to permit such an avoidance of primary state remedies where they exist, under the civil rights act of 1964. [citation omitted] There is no evidence in the legislative history of Age Discrimination in Employment Act that Congress intended a different result in 1967. Section 633(b) should be construed to mean that plaintiff must first attempt to utilize available state remedies before filing a complaint alleging discrimination based upon age."
> 359 FSupp at pp. 527-528

From the foregoing, it is readily apparent that the decision of the Honorable Cornelia Kennedy that respondent's failure to commence proceedings with MCRC in a timely fashion barred him from bringing the instant action was quite correct.

2. The division of opinion between the circuit courts on the issues presented by the petition illustrates a substantial need for a final resolution of these issues by the United States Supreme Court.

With regard to the first question presented in this Petition of whether a claimant is required to initially pursue his remedies with the appropriate state agency prior to bringing an action in federal court under the ADEA, the Sixth Circuit Court of Appeals is the only circuit which has held that a claimant is not so required. The First Circuit, *Hadfield* v. *Mitre Corp., supra;* the Second Circuit, *Reich* v. *Dow Badische Co., supra;* the Third Circuit, *Goger* v. *H. K. Porter Co.,* and *Bonham* v. *Dresser Industries, Inc., supra;* the Eighth Circuit, *Evans* v. *Oscar Mayer Inc., supra;* and the Ninth Circuit, *Curry* v. *Continental Airlines, supra* have all indicated that a claimant must indeed pursue his state remedies prior to commencing an action under

the ADEA in Federal court. As to the second issue of whether the pursuit of the state remedies must be done within the state limitations period in order to comply with §633(b), the Third Circuit has held that such timely pursuit is not necessary in *Bonham* v. *Dresser Industries, Inc., supra;* and the First Circuit has held that it is necessary to comply in §633(b) in *Reich* v. *Dow Badische Co., supra.* Given the divergence of opinions on these issues, it is readily apparent that a resolution of them by the Supreme Court is in the national interest. Clearly, a uniform interpretation and application of the ADEA is needed to properly implement this important national legislation. Those who look to this statute to protect their rights are entitled to some certainty as to what must be done to invoke the statute's enforcement mechanism. Presently, the diverse opinions from the courts have simply confused this area of the law.

Conclusion

For the above-discussed reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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APPENDIX

APPENDIX A

No. 76-2265

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

CLEMENT GABRIELE,
Plaintiff-Appellant,
v.
CHRYSLER CORPORATION,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 7, 1978.

Before: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

CELEBREZZE, Circuit Judge, delivered the opinion of the Court, in which EDWARDS, Circuit Judge, joined. LIVELY, Circuit Judge, (pp. 13-14) filed a separate concurring opinion.

CELEBREZZE, Circuit Judge. Plaintiff-appellant Clement Gabriele, a former employee of defendant-appellee Chrysler Corporation, filed an action in the district court alleging that his employment was terminated on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621.34. The district court granted Chrysler's motion for summary judgment based upon Gabriele's failure to timely file an age discrimination complaint with the Michigan Civil Rights Commission (MCRC). 416 F. Supp. 666 (E.D. Mich. 1976). The principal issue raised on appeal is whether timely resort to an agency charged with enforcement of state age discrimination laws is a prerequisite to filing suit under the ADEA in federal court.[1] We hold that the ADEA imposes no such prerequisite and reverse the judgment.

Gabriele was employed by Chrysler as an engineer from

[1] This Court expressly declined to resolve this issue in *Rucker* v. *Great Scott Supermarkets*, 528 F.2d 393, 394 (6th Cir. 1976).

1965 until he was laid off on May 9, 1975. On August 15, 1975, he filed a complaint with the MCRC alleging age discrimination.[2] On September 3, 1975, he was informed by the MCRC that it could not accept the complaint since it was not filed within ninety days of the alleged discriminatory act, as then required by Michigan law.[3] On November 6, 1975, he filed an action in the district court, alleging that the sixty-day advance notice of intent to sue, required by 29 U.S.C. §626(d), had been given to the Secretary of Labor, which Chrysler does not contest. Thus, the notice to the Secretary of Labor was necessarily given within the 180-day period set forth in 29 U.S.C. § 626(d)(1).[4]

[2] Michigan is a so-called "deferral state" in terms of 29 U.S.C. § 633 (b) since it "has a law prohibiting discrimination in employment because of age," MICH. C.L.A. § 37.2202(1)(a), *replacing* MICH. C.L.A. § 423.303a(a), and the MCRC is authorized "to grant or seek relief from such discriminatory practice," MICH. C.L.A. § 37.2602(c)-(d), *replacing* MICH. C.L.A. § 423.307(a). *Eklund* v. *Lubrizol Corp.*, 529 F.2d 247, 250 n.4 (6th Cir. 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F.2d 393, 394 n.3 (6th Cir. 1976).

[3] MICH. C.L.A. § 423.307(b), *repealed by* P.A. 1976, No. 453, § 804, eff. March 31, 1977, which eliminates any statutory limit for filing with the MCRC, apparently leaving the issue to departmental regulations.

[4] 29 U.S.C. § 626(d):

> No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
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> (1) Within one hundred and eighty days after the alleged unlawful practice occurred, or
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> (2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
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> Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Gabriele does not need the benefit of the extended period set forth in § 626(d)(2).

The district court held that the largely uncontested procedural history deprived it of jurisdiction since it read 29 U.S.C. § 633(b)[5] as mandating prior resort to an appropriate state agency before one could bring suit in federal court. It relied heavily upon cases which have held that provisions of the ADEA should be construed consistently with parallel language in Title VII of the Civil Rights Act of 1964. Noting that 42 U.S.C. § 2000e-5(c),[6] a Title VII provision

[5] 29 U.S.C. § 633(b):

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

[6] 42 U.S.C. § 2000e-5(c):

> In he case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

parallel to § 633(b), has usually been interpreted to require prior resort to an appropriate state agency before a charge can be filed with the Equal Employment Opportunity Commission (EEOC), the district court imposed a similar requirement on ADEA suits. The court also relied upon cases from this Court which it read as making a timely filing of notice of intent to sue with the Secretary of Labor, §626(d), a jurisdictional prerequisite to an ADEA suit in federal court. The district court finally noted that Congress must have been aware that some states had shorter filing periods under their age discrimination laws than the 180-day federal period and must have tacitly approved them when enacting the ADEA. This was said to justify the holding that one must not only first file a complaint with the appropriate state agency, but that filing must also be timely under state law, in order to proceed in federal court. The district court was not persuaded by arguments that its holding effectively turned the state filing limit into the federal filing limit, even though the former was only one-half of the latter.

Our research discloses a Third Circuit Court of Appeals decision which addressed the narrow but important question presented herein. *Goger* v. *H. K. Porter Co.*, 492 F.2d 13 (3d Cir. 1974).[7] In *Goger*, relied upon by the district court, the court held that although § 633(b)

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[7] *Goger* was followed in *Rogers* v. *Exxon Research and Engineering Co.*, 550 F.2d 834, 843-44 (3d Cir. 1977), *cert. den.*, —— U.S. —— (1978).

The issue was discussed but not decided in *Hadfield* v. *Mitre Corp.*, 562 F.2d 84, 87-88 (1st Cir. 1977).

Many district courts have addressed the issue. *E.g.*, *Nickel* v. *Shatterproof Glass Corp.*, 424 F. Supp. 884 (E.D. Mich. 1976) (Joiner, J.) (timely state filing not required); *Smith* v. *Jos. Schlitz Brewing Co.*, 419 F. Supp. 770 (D.N.J. 1976) (state filing not required); *Bertrand* v. *Orkin Exterminating Co.*, 419 F. Supp.

> does not require an aggrieved person to exhaust state remedies as a condition precedent to the institution of a federal suit, it does require that the State be given a threshold period of sixty days in which it may attempt to resolve the controversy, normally by voluntary compliance.
> *Id.* at 15.

Its *ratio decidendi* was that § 633(b) was nearly identical to 42 U.S.C. § 2000e-5(c)

> and courts have repeatedly interpreted the latter as requiring that appropriate state agencies be given a prior opportunity to consider discrimination complaints before resorting to the federal courts.
> *Id.* at 15-16 (footnote omitted).

The court could not find anything in the ADEA's legislative history to justify a different interpretation of § 633(b). The court held, however, that equitable considerations in that case excused the plaintiff's failure to resort to the ap-

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[7] continued

1123 (N.D. Ill. 1976) (dictum suggesting state filing not required); *Magalotti* v. *Ford Motor Co.*, 418 F. Supp. 430 (E.D. Mich. 1976) (Feikens, J.) (timely state filing not required); *Fitzgerald* v. *New England Tel. & Tel. Co.*, 416 F. Supp. 617 (D. Mass. 1976) (state filing required); *Bertsch* v. *Ford Motor Co.*, 415 F. Supp. 619 (E.D. Mich. 1976) (Pratt, J.) (state filing generally required but timely federal filing supports action); *Vazquez* v. *Eastern Air Lines, Inc.*, 405 F. Supp. 1353 (D.P.R. 1975) (state filing not required); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797 (D.N.H. 1975) (timely state filing not required); *Vaughn* v. *Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974) (Kaess, J.) (state filing required but subject to equitable consideration); *McGarvey* v. *Merck & Co.*, 359 F. Supp. 525 (D.N.J. 1973), *vacated without opinion*, 493 F. 2d 1401 (3d Cir.), *cert. den.*, 419 U.S. 836 (1974) (state filing required).

See Annot., 24 A.L.R. Fed. 808, § 3[c].

propriate state agency and the case was remanded to the district court for a hearing on the merits.[8]

Judge Garth filed a concurring opinion in *Goger* in which he agreed that the case should be remanded for consideration of the merits of the complaint. He disagreed, however, that § 633(b)'s similarity to 42 U.S.C. § 2000e-5(c) mandated construing the two statutes similarly. He concluded "there is no requirement that a plaintiff must first attempt to utilize available state remedies before filing suit under the 1967 Act." *Id.* at 17. He approved the position taken there by the Secretary of Labor as *amicus curiae* that resort to a state agency is completely optional and that § 633(b)'s sixty-day waiting period applies only *if* one has chosen to pursue state relief.[9]

We agree with the reasoning of Judge Garth in *Goger* and reject the holding of the majority in that case.[10]

This Court has recognized the parallels between the ADEA and Title VII of the Civil Rights Act of 1964 but has also cautioned against blindly applying Title VII reasoning and results to ADEA cases. *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 311-12 (6th Cir. 1975). Transferring the construction of 42 U.S.C. § 2000e-5(c) to § 633(b) is particularly inappropriate.[11] The two statutes are indeed very

[8] The court's remand indicates that it did not consider prior resort to a state agency jurisdictional in the sense that absent such fact the district court would not have power to hear the case. Rather, it considered this requirement a statutory condition precedent to suit in federal court, subject to equitable considerations. *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977).

[9] The Secretary of Labor as *amicus curiae* has taken the same position in this appeal.

[10] Comment, *Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act*, 44 U. CHI. L. REV. 457 (1977).

[11] Note, *State Deferral of Complaints Under the Age Discrimination in Employment Act*, 51 NOTRE DAME LAWYER 482 (1976).

similar but neither is explicit on the question of whether resort to the appropriate state agency is required before beginning federal action. Most courts that have read §2000e-5(c) as requiring such prior resort have done so because Title VII's legislative history is very clear on that point. *Dubois* v. *Packard Bell Corp.*, 470 F.2d 973, 975 (10th Cir. 1972); *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 422 F.2d 1028, 1030-31 (9th Cir. 1970), *vacated and remanded*, 400 U.S. 1004 (1971); *EEOC* v. *Union Bank*, 408 F.2d 867, 869-70 (9th Cir. 1968); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F.2d 267, 268 (4th Cir. 1967), *cert. den.*, 390 U.S. 910 (1968); *Ethridge* v. *Rhodes*, 268 F. Supp. 83, 89 (S.D. Ohio 1967). There is no similar legislative history accompanying § 633(b), so the rationale behind the prevailing interpretation of § 2000e-5(c) simply does not apply to § 633(b). Indeed there is legislative history suggesting that § 633(b) should be construed differently than §2000e-5(c). A committee report accompanying the ADEA states that § 633 "provides for *concurrent* Federal and State actions . . . ," H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE. CONG. AND ADMIN. NEWS 2213, 2218 (emphasis added), indicating that complaints could originate in either state or federal fora.[12] This is, of course, far from a clear indication that Congress intended § 633(b) to be construed differently than § 2000e-5(c). Our review of the legislative history of the ADEA is only meant to point out the absence of the kind of clear legislative history supporting the construction gen-

[12] Portions of the ADEA were patterned after the Fair Labor Standards Act, further demonstrating that the ADEA was not meant to be a mirror-image of Title VII. H. R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. AND ADMIN. NEWS 2213, 2218.

erally given § 2000e-5(c), thus necessitating consideration of other factors to support our result.

The principal reason we perceive for construing § 633(b) differently than § 2000e-5(c) is found in the language of § 633(a).[13] That provision states that once action is commenced under the ADEA, it "supersede[s] any State action." Thus, even under Chrysler's view of this action, Gabriele could have totally cut off any state action he might have been required to initiate simply by waiting sixty days and beginning federal action. As Judge Garth said in *Goger*, we

> do not believe that it was the intent of Congress to require, prior to institution of a Federal action, the commencement of a State proceeding which, under § 633(b), need not be concluded and which in any event would be superseded by the filing of the Federal action 492 F.2d at 18.

Moreover, § 633(a) has no parallel in Title VII. Title VII also does not require exhaustion of state remedies but only the nitiation thereof, *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 422 F. 2d 1028, 1031 n.5 (9th Cir. 1970), but Title VII has no provision for superseding state proceedings merely by beginning federal action. *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1212 (1971). The ADEA thus exhibits lesser deference to the states than does

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[13] 29 U.S.C. § 633(a)

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

Title VII and gives us no compulsion to require state action as a prerequisite to an ADEA suit.

Another important distinction exists between § 633(d) and § 2000e-5(c). The latter states that "no charge may be filed" until after the sixty-day wating period. This prevents all federal action during the wating period, since filing of a charge with the EEOC is a prerequisite to a Title VII suit in federal court. The sixty-day period gives the appropriate state agency two months of exclusive jurisdiction over the discrimination allegation. Section 633(b), on the other hand, says "no suit may be brought" until after the sixty-day waiting period. This only prohibits the filing of a complaint in the district court and contemplates possible concurrent administrative action by the state agency and the Department of Labor. *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194, n. 8 (3d Cir. 1977). The absence of a period of exclusive state jurisdiction under the ADEA is thus another indicia of lesser deference to the states under the ADEA than under Title VII. Again, this militates in favor of not requiring prior resort to a state agency before an ADEA suit in federal court.

Another reason for our conclusion is found in the general purposes of the ADEA. It is remedial legislaiton, designed "to promote employment of older persons based on their ability rather than age," 29 U.S.C. § 621(b), and is entitled to a liberal construction. *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 93-94 (8th Cir. 1975); *Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 801 (D.N.H. 1975); *Woodford* v. *Kinney Shoe Corp.*, 369 F. Supp. 911, 914 (N.D. Ga. 1973). The interpretation of § 633(b) by the district court puts an unnecessary burden on all age discrimination complainants

and worked a draconian result in this case.[14] The need for quick dispute reasolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily. An older person should be allowed to choose the quicker of the two available remedies and not be forced to first choose the state remedy if that would unduly impede a prompt resolution of his grievance.

Chrysler argues that the district court properly relied upon several of this Court's decisions requiring a timely filing of notice of intent to sue with the Secretary of Labor, § 626(d), as a prerequisite to suit in federal court. Initially, we express doubts about the correctness of the reading of those cases by both Chrysler and the district court.[15] But even if we accept the idea that we have strictly construed

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[14] Even the Third Circuit, whence came *Goger*, does not require a timely state filing if the state period is shorter than the federal 180 days. It recognized that this improperly turned the state filing period into the federal filing period. *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977). *Cf. Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 832-33 (9th Cir. 1975), *cert. den.*, 429 U.S. 1090 (1977); *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1232 (8th Cir. 1975) (both Title VII).

[15] This Court's decisions construing § 626(d) have been cited, by Chrysler and others, for the proposition that a timely filing under §626(d) is a strict jurisdictional prerequisite to suit in federal court. Close examination of those cases, however, reveals that that is not an accurate reading of them. The first case, *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 633-34 (6th Cir. 1975), did say that the notice requirement was "jurisdictional" but expressly refused to decide whether it could be treated like a statute of limitations which could be tolled or otherwise be subject to equitable considerations since the plaintiff's filing in *Hiscott* was not timely even if tolling doctrines were employed. The second case, *Ott* v. *Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975), merely cited *Hiscott* for the proposition that the § 626(d) filing was "jurisdictional." The last two cases, decided by the same panel on the same day, also relied upon Hiscott for the notion that § 626 (d)'s requirement was a jurisdictional prerequisite to suit in federal court. *Eklund* v. *Lubrizol Corp.*, 529 F.2d 247, 249 (6th Cir. 1976); *Rucker* v. *Great Scott Supermarkets*, 528 F.2d 393, 394 (6th Cir. 1976). Both cases recognized, however, that appropriate facts could warrant relief from § 626(d)'s specific requirements. 529 F.2d at 250; 528 F.2d at 395. *See also* the opinions of then Judge, now Solicitor General, McCree in each case. 529 F.2d at 250-51 (dissenting, on the grounds that equitable relief was warranted); 528 F.2d at 395 (concurring, on the grounds that equitable relief was not warranted.) This demonstrates that these decisions use the term "jurisdictional" in the loose sense that § 626(d)'s requirements are a condition precedent to suit in federal court and not in the strict sense that non-compliance deprives the district court of power to hear the case. *Dartt* v. *Shell Oil Co.*, 539 F.2d 1259-61 (10th Cir. 1976), *aff'd by an equally divided court*, —— U.S. —— (1977). *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 (3d Cir. 1977). *Cf. Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975) (Title VII). *But cf. Powell* v. *Southwestern Bell Tel. Co.*, 494 F.2d 485, 487-89 (5th Cir. 1974).

§ 626(d), that does not lead to a strict construction of § 633(b). The sections are meant to serve different purposes.

Chrysler finally argues that § 626(d)(2) precludes the result we reach here. That provision extends to 300 days, or thirty days after receipt of notification of termination of state proceedings, whichever is earlier, the time within which notice of intent to sue shall be filed with the Secretary of Labor. But it only does so "in a case to which section 633(b) . . . applies." Chrysler argues that if § 633(b) is interpreted to give an aggrieved person an option to commence either state or federal action then the "anomalous result" is that one who deliberately bypasses the state agency still gets the benefits of the extended filing period merely by virtue of being in a "deferral state."[16] This possible result may or may not be "anomalous" but we believe it is incorrect in any event. One obtains the benefits of the extended filing period in § 626(d)(2) *only* if he is in a "deferral state" *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. *Cf. Skoglund* v. *Singer Co.*, 403 F.Supp. 797, 803 (D.N.H. 1975). It is only if one uses

time to let the state try its hand that he needs more time to notify the Secretary of Labor. Furthermore, any state filing need only be made within the minimum 180 days allowed for the federal filing, § 626(d)(1), in order to obtain the benefits of § 626(d)(2). *Cf. Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1232 (8th Cir. 1975) (Title VII). *Contra, Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 n. 5 (3d Cir. 1977). To require the state filing to be timely under a shorter state period would improperly elevate state law over federal law. If the state filing is not timely under state law, presumably the complainant would not get the full 300 days to file with the Secretary of Labor since § 626(d)(2) also imposes a limit of within thirty days of receipt of notification of termination of state proceedings, if that is earlier than 300 days.[17] This will prevent undue manipulation of the filing limits by an aggrieved person.

Chrysler contends that this interpretation of §§ 633(b) and 626(d)(2) amounts to "judicial legislation." We disagree. Congress stated in § 626(d)(2) that the extended filing period applies only in cases "to which Section 633(b) . . . applies" and our construction of § 633(b) is that it does *not* apply if an aggrieved person does not elect to proceed with available state remedies. This is far from "judicial legislation" but rahter is a judicial harmonization of a statutory package which is admittedly less than a model of clarity. This is a proper function for courts and one we are called upon to perform regularly.

We determine that 29 U.S.C. § 633(b) does not require

[16] See note 2, *supra*.

[17] One obviously always has 180 days to notify the Secretary of Labor, pursuant to § 626(d)(1), even if § 626(d)(2) is applicable and thirty days elapse after he receives notice of termination of state proceedings before the 180 day period expires.

prior resort to an available state agency as a prerequisite to an ADEA suit in federal court. Rather, it gives an aggrieved person the option of pursuing state remedies. If that option is elected, then the state agency must be given the required sixty days to attempt to reconcile the dispute before a suit can be filed in federal court, unless state proceedings are earlier terminated.[18] The election of first pursuing state remedies, permitted at any time within 180 days of the alleged discriminatory practice, is also required to take advantage of the extended filing period set forth in § 626(d)(2) regarding the notice of intent to sue given to the Secretary of Labor. If an aggrieved person does not elect to pursue available state remedies, then he may bring suit directly in federal court, subject to the sixty-day notice provision of § 626(d)[19]

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

LIVELY, Circuit Judge, concurring. I concur in the result, but an unable to accept all of the reasoning of the majority opinion. In particular, I am not persuaded that the legislative history of ADEA leads to the conclusion that a complainant in a "deferral state" may elect to begin an action in federal court without any resort to the state agency. The majority quotes a fragment from the House Report in support of this determination. However, when read in its entirety, the paragraph from which this quotation is taken

[18] If a suit is filed before the expiration of the sixty-day period, the district court need not dismiss the complaint but should hold the case in abeyance for the requisite period of time. *Cf. Mitchell* v. *Mid-Continent Spring Co.*, 466 F.2d 24, 26-27 (6th Cir. 1972), *cert. den.*, 410 U.S. 928 (1973) (Title VII).

[19] See notes 4 & 15, *supra*, concerning when that notice must be filed with the Secretary of Labor.

leads me to the opposite conclusion. That paragraph reads:

> Federal-State relationship
>
> Section 14 provides for concurrent Federal and State actions, except that in States having laws prohibiting discrimination in employment because of age, no suit may be brought under this act before the expiration of 60 days after proceedings have been commenced under the State law (120 days during the first year after the effective date of the State law), unless such proceedings have been earlier terminated, and commencement of an action under this act shall be a stay on any State action previously commenced.
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> H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted* in 1967 U.S. Code. Cong. and Adm. News 2213, 2218-19.

The language following the word "except" in the above quotation denotes a Congressional deference to state agencies. This language, together with the "superseding clause" cited by the majority, 29 U.S.C. § 633(a), establishes a procedure under which a complainant in a deferral state must first initiate proceedings with the state agency, giving the agency 60 days in which to attempt a solution by conciliation, but is not required to continue to pursue state remedies after the expiration of that period. Such a construction is compatible with expressed Congressional concerns for harmonious state-federal regulations in the national enterprise of eliminating unlawful discrimination in employment practices. Statements of these concerns abound in the legislative history of both Title VII and ADEA.

However, untimely resort to the state agency for attempted conciliation should not deprive a claimant of his

right to seek relief in a federal court where the state allows less than 180 days for filing. I would adopt the following language from the Third Circuit's opinion in *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3rd. Cir. 1977):

> We do not think that is was the intent of Congress to allow states to shrink the federal remedy for age discrimination by imposing limitation periods shorter than the federal ones. If compliance with Pennsylvania's 90-day filing period is deemed a jurisdictional condition precedent to suit under the ADEA, the federal 180-day limitations period becomes 90 days for residents of Pennsylvania, and the availability of the federal remedy is seriously undermined. *Cf. Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1288 (8th Cir. 1975) (Title VII). Moreover, any equitable grounds for relaxing the federal limitations period would evaporate if not recognized by the state.
>
> We do not hold that the mere existence of a state limitations period which is shorter than the federal one relieves a plaintiff of his obligation to birng his complaint to the attention of the state authorities. Rather, we hold only that if plaintiff files his complaint with the state agency within the federal 180-day period, the state's conclusion that the filing is untimely under state law will not bar the federal suit. We think this rule is in accord with Congressional intention, consistent with *Goger* and *Rogers*, and compelled by our conclusion that the federal 180-day requirement is itself in the nature of a statute of limitations and subject to equitable modification.

569 F.2d at 194 (footnote omitted).

APPENDIX B

UNITED STATES DISTRICT COURT,

E. D. MICHIGAN, S. D.

July 21, 1976

CLEMENT GABRIELE,
Plaintiff,

v.

Civ. A.
No. 75-72164

CHRYSLER CORPORATION,
Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CORNELIA G. KENNEDY, District Judge.

Plaintiff in this action alleges that his employment with defendant was terminated because of his age. Although there are several theories stated in the complaint which plaintiff believes entitle him to relief, the sole theory which would give this Court jurisdiction is the claim that plaintiff's termination was a violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*

[1] Defendant has moved for summary judgment urging that plaintiff's admitted failure to file a complaint with the Michigan Civil Rights Commission within the 90 days provided by State law bars plaintiff from bringing a federal action.[1] Plaintiff asserts that he has the option of filing a

[1] If defendant is entitled to summary judgment as to this federal claim, the remaining parts of the complaint should be dismissed without prejudice. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

complaint with the State or not, and, further, that even if he must file such a complaint he is not restricted to doing so within the 90-day limitation period of the Michigan statute.

The relevant dates are as follows:

1. May 9, 1975, plaintiff terminated;
2. August 15, 1975, plaintiff attempts to file complaint with Michigan Civil Rights Commission;
3. September 3, 1975, Michigan Civil Rights Commission writes to plaintiff, stating that it "cannot accept your complaint" because it was not filed within 90 days of the act of alleged discrimination as required by state law;
4. November 6, 1975, the instant action filed in District Court.

The complaint alleges that plaintiff has given the Secretary of Labor 60 days' notice of his intent to sue as required by the Act. While no dates are mentioned, defend- does not dispute this allegation.

The Age Discrimination in Employment Act includes the following provisions:

> No civil action may be commenced by any individual under this section until the individual has given the Secretary [of Labor] no tless than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, or
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> (2) in a case to which section 633(b) of this tilte applies, within three hundred days after the alleged unlawful practice occurred or within thirty

> days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

29 U.S.C. § 626(d).

Section 633(b) referred to in the preceding passage reads, as follows:

> In the case of an alleged unlawful practice occurring in a state which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated, ... If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Michigan is clearly a state which has both an act prohibiting age discrimination, MSA § 17.458(3a), and an agency empowered to enforce the statute. MSA § 17.458(7). See *Eklund* v. *Lubrizol Corp.*, 529 F.2d 247, 250 (6th Cir. 1976).

The Michigan statute contains the following provision regarding the time for filing of complaints:

> Any individual claiming to be aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, within 90 days after the alleged act of discrimination, a verified complaint in writing.

MSA § 17.458(7)(b).

[2] There are few reported cases dealing directly with the issue raised here. However, most courts have agreed that the age discrimination statute should be interpreted consistently with the almost identical language of Title VII of the Civil Rights Act of 1964. See *Goger* v. *H. K. Porter*, 492 F.2d 13 (3d Cir. 1974); *Curry* v. *Continental Airlines*, 513 F.2d 691 (9th Cir. 1975). The legislative history of the age discrimination statute, discussed at length, *infra*, supports this conclusion.

The parallel provisions of Title VII are, as follows:

• • •

limitaiton period) was filed with the State agency. The court in that case relied on two Title VII cases that had held that the State filing requirements were not technically "jurisdictional" but were rather in the nature of conditions precedent. The *Skoglund* Court concluded:

> I find that, although Section 633(b) requires timely resort to state remedies before a complaint may be filed in federal court, this requirement is not jurisdictional; therefore, plaintiff's failure to notify the Massachusetts Commission Against Discrimination in a timely fashion does not bar him from this court.

The effect of treating untimely filings as sufficient compliance with State requirements is, of course, to extend the possible period for bringing action in those states to 300 days, an anomalous result.

The Sixth Circuit has not spoken definitely as to how the provisions of the age discrimination statute should be interpreted, since it has not dealt directly with the question of the necessity of State agency filings. See *Rucker* v. *Great Scott Supermarkets,* 528 F.2d 393, 394 (6th Cir. 1976). However, in discussing the necessity of filing with the Secretary of Labor, it has said:

> This Court, in *Hiscott* v. *General Electric Co.,* 6 Cir., 521 F.2d 632 . . . following a review of the Act's legislative history, concluded that compliance with the notice requirements contained in § 626 is a jurisdictional prerequisite to the filing of an action under ADEA.

Eklund v. *Lubrizol Corporation,* 529 F.2d 247, 249 (6th Cir. 1976). On the other hand, in another case, it qualified the rule:

> Appellant's failure to afford the Secretary sixty days' notice of his intent to sue requires this Court to affirm the dismissal of Appellant's action unless the special facts of the case warrant the granting of equitable relief.

Rucker v. *Great Scott Supermarkets,* 528 F.2d 393, 395 (6th Cir. 1976).

Applying the literal language of the statute and its logical interpretation, i.e., the requirement that

> "no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State",

means proceedings which were commenced timely under State law also results in unequal periods during which actions may be brought under the federal statute, depend-

ing upon the particular state in which the claimant is employed.

A plaintiff in Michigan, which has enacted a law giving him rights that he would not have in, for example, Ohio, is forced to comply with more stringent procedural requirements than a comparable Ohio plaintiff in order to pursue his federal statutory rights. The Ohio plaintiff can sue in federal court by filing a complaint with the Secretary of Labor within 180 days; however, the Michigan plaintiff must file with the State agency within 90 days or be barred from his federal court remedies.

It is this situation which prompted the conclusion of The Honorable Philip Pratt in *Bertsch* v. *Ford Motor Company,* 415 F.Supp. 619, E.D.Mich., 1976. Although recognizing that "Therefore, it is fair to infer that state procedures, including limitations periods, were intended to be incorporated into the exhaustion requirement of § 633(b)", he concluded

> . . . it is a fair presumption that Congress did not intend that those state practices which differ substantially from the federal, such as a 90 day limitations period, be afforded unchecked deference. Consideration of all of the relevant policies prompts this Court to conclude that Congress intended that state limitations periods be fully operative ot the extent that their operation is fair, feasible, and practicable. That is, when they do not unduly interfere with the assertion of the federal right, they must be enforced. When, however, they are substantially shorter than the federal period, compliance should not be an automatic and mandatory pre-condition to suit. Rather, timely resort should generally be required. Certainly,

it should be necessary if one seeks to secure the benefit of the longer 300-day federal filing period. However, where, as here, the failure to timely exhaust is only a function of lack of knowledge and the state refuses jurisdiction, a claimant should be afforded the benefit of the shorter 180 day federal period allotted by Congress as the time "reasonably required . . . to prepare and file a claim." *(Davis* [*Davis* v. *Valley Distributing Co.*, 9 Cir., 522 F.2d 827], *supra,* at 827). If he properly files a notice of intent to sue with the Secretary of Labor within that time, the civil action may proceed.

The 180-day limitation is carried forward in order to avoid deliberate by-pass or enlarge the time where a claimant has failed to comply with the state procedures. Although this Court, were it enacting such legislation, would concur with the desirability of the result reached by this Court's colleague, it is unable to interpret the statute in this fashion. That Congress was aware that state procedures might be more restrictive than it intended is shown by the express provision that should commencement of state proceedings require more than "a written and signed statement of facts" a state proceeding would be "deemed commenced" with that simple requirement. It flies in the face of reason to conclude that Congress intended state proceedings might be commenced at any time the claimant selected, rather than the period set by the state statute. It should be noted that Title VII until its 1972 amendment had a 90-day limitation period. Thus, apparently Congress was not concerned that such a period was too short a time for the filing of a complaint when it adopted the Age Discrimination in Employment Act in 1967.

The legislative history of the Age Discrimination in Employment Act does not conclusively settle the question of whether an employee who attempts to file with the state agency, but not within the time provided to do so under state law, is barred from bringing a federal court action under the Act. A number of items in the hearings' reports and debates are helpful, however.

First, it must be realized that none of the provisions regarding the requirements of seeking redress from administrative agencies were contained in the original bills, S. 830 and H.R. 4221. In the Civil Rights Act of 1964, Congress had directed the Secretary of Labor to make a study of the problem of Age Discrimination in Employment. See House Report No. 805, 90th Cong., 1st Sess., Oct. 23, 1967. [House Report]. 1967 *U.S.Code Cong. & Admin.News* pp. 2213, 2214. [House Report].

Following the completion of the Report, the Congress directed the Secretary to formulate and submit specific legislative proposals. 1967 *U.S.Code Cong & Admin.News* at p. 2214. These recommendations took the form of S. 830 and H.R. 4221, 90th Congress, 1st Session.

These bills contained an enforcement mechanism that was very similar to the NLRB procedure used in enforcing the National Labor Relations Act. A new agency would have been empowered to conduct hearings, make findings, and seek enforcement in the Court of Appeals. Individual employees would not have been authorized to bring civil actions by those bills.

The section of the bills that corresponds to the present section 633, dealing with "Federal-State relations," provided only that, "Nothing in this Act shall affect the juris-

diction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age." H.R. 4221, section 14.

Both the House and Senate committees added the language that is the present section 633(b). There was very little discussion in the hearings (and none in the reports or the debate) of why this was done. There are two marginally relevant portions of the Senate hearing. First, Mr. Andrew Biemiller, the legislaitve director of the AFL-CIO, commented during the Senate hearings:

> Senator Fannin: Would you like to comment or give your thoughts as to what should be done as far as any preemption is concerned?
>
> M. Biemiller: We are frankly a little disturbed by the section in the bill that is now before you which is designed to negative [sic] Federal preemption in this field. I think it could lead to great confusion, because if I read it properly, you are virtually leaving the State laws unhampered in their respective jurisdictions.
>
> It would seem to me it would be a far more practical and preferable solution if you would take the pattern that was developed by Senator Dirksen and Senator Humphrey, working in concert, in connection with Title VII of the Civil Rights Act of 1964, creating the Equal Employment Opportunities Commission. There as I recall, when you have a State law that is substantially in agreement with the Federal law a matter of 60 days is given to the State fair employment agency to try to solve the problem.
>
> At the end of that time, if the matter is not resolved the case is moved to the Federal agency. I think this

> would be preferable to trying to say that, where there is a State law, the State agency shall have full and complete jurisdiction.

Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 830 & S. 788, 90th Congress, 1st Sess.1967, at 102 [Senate hearings].

A tangential comment was made by Edward Conway of the New York Commission on Human Rights:

> It is of particular importance that careful attention be given to the Federal-State relationship which will arise from the enactment of Federal legislation in the field of human rights where existing State legislation has been administered successfully over a period of years. This factor was taken into account by the Congress upon its consideration and enactment of the Civil Rights Act of 1964.
>
> The experience under those provisions would appear to confirm the need for avoiding any implications of preemption of the field under the Federal statute. This requires a clear and specific saving clause which will not only save the jurisdiction of the State agencies, but will avoid to the greatest extent possible the coming into being of unnecessary duplications of effort.

Senate hearings, at 233-234.

As indicated above, the committees added section 633(b) in language very similar to that of the corresponding provision of Title VII, without noting the reason for the addition. Th econclusion seems inescapable that the section was patterned after Title VII.

There are also a few comments which attempt to distinguish the procedures of the age discrimination act from Title VII. However, these comments seem directed at allaying fears that the administration of the two acts would interfere with each other. See, e. g., 113 Cong.Rec. 31255 (1967) (Sen. Javits):

> The last question raised by the Senator from Coloradio [Mr. Dominick], and which I also think we should take account of, is the question of any conflict which might develop in the administration of the law as related also to the Civil Rights Act of 1964, which has some provisions in it with respect to discrimination in employment, or employment opportunity on grounds of race or color.
>
> I do not think this presents any particular problem. The Civil Rights Act of 1964 does not cover age discrimination, and S. 830 does not cover racial or religious discrimination. The laws will operate completely independently of each other, as will the enforcement procedures.

It is quite consistent to conclude that the two provisions will be enforced independently and that parallel enforcement provisions will nonetheless be employed.

The language of section 626(d), relating to the 180-day period for filing with the Secretary of Labor (and 300 days if the State has an enforcement agency) was added on the suggestion of Senator Javits, as part of a more general revision of the enforcement provisions. See 113 Cong.Rec. 35055 (1967). The thrust of the change was to make the basic enforcement provisions like those of the Fair Labor Standards Act, rather than the NLRB-type enforcement mechanism. Senate hearings at 24-25, 26, 113, 221.

There is no discussion of the reason for the 180-period within which complaints must be filed with the Secretary of Labor; however, there are a number of comments about the reason for the change to the FLSA system generally.

Secretary of Labor Wirtz, the chief administration spokesman in the hearings explained the differences as follows:

> [under the administration bill] there would be involved in a particular case, first, of course, the persuasion procedures, which I don't mean to pass over lightly because experience indicates that is where most of these matters would be worked out. If they could not be worked out that way, there would be the institution of an administrative proceeding by the Secretary of Labor against the employer . . . The Secretary would attempt to get back pay, reinstatement only or reinstatement with back pay.
>
> If a satisfactory settlement did not result, there would be the institution of proceedings in court in order to enforce the administrative decision. The procedure in court would parallel the procedure under the National Labor Relations Act.
>
> In a Fair Labor Standards Act proceeding you have a situation in which you must move more immediately into the court and depend more fully on the court proceeding. There is also authority under FLSA procedure for a private suit to be instituted by an aggrieved employee.

Hearings on H.R. 4221 before the Subcommittee on Labor of the House Education and Labor Committee, 90th Cong., 1st Sess. 1967 at 14-15.

Senator Javits maintained that his proposal would be superior because it would utilize an existing agency, rather than create a new one. Senate hearings at 27.

A representative of the United States Chamber of Commerce preferred the Javits version because it would lead to greater use of the courts which he felt would be fairer and generally more satisfactory to those involved in disputes. Senate hearings, at 113.

All of this would be far more helpful if the Fair Labor Standards Act had provisions requiring filing of complaints with an agency before an individual could institute a suit.

However, it is clear that Senator Javits thought that resort to the federal agency, at least, was required: "The method of enforcement almost exactly parallels that used in minimum wage and hour cases—that is direct action in the District Court by the Secretary of Labor or the employee for appropriate relief. Such action may only be commenced after informal methods of conciliation have been exhausted." (Senate hearings at 24-25).

One court has relied on a statement of Secretary Wirtz to support the conclusion that the purpose of the Federal-State relations section was to allow states to impose more strict prohibitions against age discrimination than were contained in the federal statute. *Goger* v. *H. K. Porter Company,* 492 F.2d 13, 18 (3d Cir. 1974) (concurring opinion). However, this is a questionable interpretation of the statement. Secretary Wirtz was asked the following question (in writing) by Senator Javits:

> Does the preservation of the jurisdiction of State agencies in Sec. 14 allow State agencies to impose prohibitions against age discrimination and employ-

> ment stricter than those provided under Federal law?

Secretary Wirtz answered "Yes." Senate hearings at 48. That the provision would *allow* a certain result does not mean that its purpose was to produce that result.

There is no doubt that Congress was aware of the existence of age discrimination laws in about one-half of the states. See House Report, at 2215. There is less certainty that Congress knew of the time periods within which complaints to state agencies were required to be filed. At least four states had, at that time, statutes that required filing of complaints within time periods shorter than the 180 days provided for filing with the Secretary of Labor under the federal statute: Connecticut: Conn. Gen. Stat. Ann § 31-127 (90 days); Hawaii: Haw. Laws, 1963 ch. 80 Sec. 3 (90 days); Indiana: Burns Ind. Stat. § 40-2323 (agency complaint against employer required to be filed within four months of discriminatory practice—any employee complaint would necessarily precede agency action); Michigan: 1965 P.A. No. 344 (incorporating 90-day period in general employment discrimination enforcement section) (the Michigan statute was later held to have been unconstitutional by the State courts. *Hudak* v. *Ex-Cell-O Corp.,* 58 Mich.App. 135, 227 N.W.2d 251 (1975), the present statute was enacted in 1972).

The reports, hearings and debates do not comment on these provisions; however, the provisions of the Hawaii and Indiana statute, including the 90-day requirement of filing, are printed in the House and Senate hearings as part of material submitted to the committees by several associations composed of insurance agents and/or companies. See House Hearings at 500-518 (especially 502-512); Senate

Hearings at 298-316. There is no reason to infer Congress was not fully aware of matters presented to it and printed in its hearings.

[3] The clear mandate of the statutory language, that "no action may be commenced by an individual" unless the requirements of 626(d) and by incorporation therein 633(b) are complied with bars the plaintiff from bringing this action under the Age Discrimination in Employment Act. His action insofar as it is based on that statute is DISMISSED WITH PREJUDICE. The balance of his claim is DISMISSED WITHOUT PREJUDICE.[2]

[2] The Court wishes to make it clear that it is not passing on the question of whether plaintiff has stated a claim under State law as enunciated in *Pompey* v. *General Motors Corp.*, 385 Mich. 537, 189 N.W.2d 243 (1971) or has stated a claim for breach of an employment contract.

APPENDIX C

Statutes

The Age Discrimination in Employment Act, 29 USC, *et seq.* at Section 633 reads as follows:

> "Limitation of Federal action upon commencement of State proceedings
>
> "(a) Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.
>
> "(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority, other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

Section 626(d) of the Age Discrimination in Employment Act reads as follows:

> "(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> "(1) within one hundred and eighty days after the alleged unlawful practice occurred, or
>
> "(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> "Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

Title VII of the Civil Rights Act of 1964, 42 USC 2000e-5(c) reads as follows:

> "(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge

> may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."